Nos. 91-744, 91-902

FILED
MAR 6 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA,
REPRODUCTIVE HEALTH AND COUNSELING CENTER,
WOMEN'S HEALTH SERVICES, INC.,
WOMEN'S SUBURBAN CLINIC,
ALLENTOWN WOMEN'S CENTER, and
THOMAS ALLEN, M.D.,
on behalf of himself and all others similarly situated,
Petitioners,

v.

ROBERT P. CASEY, N. MARK RICHARDS, and
ERNEST D. PREATE, JR.,
personally and in their official capacities,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR REPRESENTATIVES DON EDWARDS, PATRICIA SCHROEDER, LES AUCOIN, VIC FAZIO, BILL GREEN AND CONSTANCE A. MORELLA; SENATORS ALAN CRANSTON, BOB PACKWOOD, HOWARD METZENBAUM, JOHN CHAFEE, TIMOTHY E. WIRTH, WILLIAM S. COHEN, BROCK ADAMS, AND BARBARA MIKULSKI; AND CERTAIN OTHER MEMBERS OF THE CONGRESS OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

LLOYD N. CUTLER
MICHAEL C. SMALL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

WALTER DELLINGER *
Duke Law School
Corner of Science Drive
and Towerview Road
Durham, NC 27706
(919) 684-3404

Attorneys for the Amici Curiae

March 6, 1992 * Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. *STARE DECISIS* CONCERNS ARE IMPLICATED BY THIS CASE BECAUSE THE CONTINUED VALIDITY OF THE CONSTITUTIONAL PRINCIPLES ESTABLISHED IN *ROE v. WADE* ARE DIRECTLY AT ISSUE	4
II. *STARE DECISIS* CONCERNS STRONGLY COUNSEL ADHERENCE TO THE CONSTITUTIONAL PRINCIPLES ESTABLISHED IN *ROE v. WADE*	9
A. *Stare Decisis* Fosters Respect For The Rule of Law and Government Institutions, and Preserves the Settled Expectations and Practices of Individuals Who Have Relied on Court Precedent in Ordering Their Lives	9
B. *Stare Decisis* Concerns Apply with Special Force to *Roe v. Wade*	12
III. THERE IS NO JUSTIFICATION FOR DEPARTING FROM *STARE DECISIS* AND ABANDONING THE CONSTITUTIONAL PRINCIPLES OF *ROE v. WADE*	17
A. *Roe v. Wade* Has Not Been Undermined by Subsequent Developments	17
B. *Roe* is Neither "Unsound In Principle" Nor "Unworkable In Practice"	19
1. The Principles Established in *Roe* are Sound, and Cannot be Rejected Without Imperiling Other Aspects of Privacy and Liberty	19

TABLE OF CONTENTS—Continued

Page

2. *Roe* Has Proven No Less Workable in Practice Than Other Constitutional Precedents 24

C. Overruling *Roe* Would Have Profoundly Adverse Consequences 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) ..... *passim*
Arizona v. Fulminante, 111 S. Ct. 1246 (1991) 15
Beal v. Doe, 432 U.S. 438 (1977) 5
Bellotti v. Baird, 443 U.S. 622 (1979) 5
Bowers v. Hardwick, 478 U.S. 186 (1986) 19
Brown v. Board of Education, 347 U.S. 483 (1954) 13, 29
Brown v. Board of Education, 349 U.S. 294 (1955) 11
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) 14, 17
California v. Acevedo, 111 S. Ct. 1982 (1991) 15
Canada Packers, Ltd. v. Atchison, Topeka & Santa Fe Railway, 385 U.S. 182 (1966) 17, 25
Carey v. Population Services International, 431 U.S. 678 (1977) 19, 22
Colautti v. Franklin, 439 U.S. 379 (1979) 5
Connecticut v. Menillo, 423 U.S. 9 (1975) 5
Cooper v. Aaron, 358 U.S. 1 (1958) 11
Doe v. Bolton, 410 U.S. 179 (1973) 5, 26
Eisenstadt v. Baird, 405 U.S. 438 (1972) 18, 20, 22
Ferguson v. Skrupa, 372 U.S. 726 (1963) 18
Florida Department of Health v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981) 10
Frontiero v. Richardson, 411 U.S. 677 (1973) 14
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 16, 17, 24
Green v. United States, 355 U.S. 184 (1957) 11
Griswold v. Connecticut, 381 U.S. 479 (1965) ...18, 20, 22
Guam Society of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422 (D. Guam 1990) 28
H.L. v. Matheson, 450 U.S. 398 (1981) 5
Harmelin v. Michigan, 111 S. Ct. 2680 (1991) 18
Harris v. McRae, 448 U.S. 297 (1980) 5
Hilton v. South Carolina Public Railway Commission, 112 S. Ct. 560 (1991) 9
Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) 5, 8
Hudgens v. NLRB, 424 U.S. 507 (1976) 17, 18

TABLE OF AUTHORITIES—Continued

	Page
King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991)	8, 9
Jane L. v. Bangerter, No. 91-C-345-G (D. Utah complaint filed April 4, 1991)	28
Lochner v. New York, 198 U.S. 45 (1905)	16, 17
Loving v. Virginia, 388 U.S. 1 (1967)	18, 20, 21
Maher v. Roe, 432 U.S. 464 (1977)	5
Marks v. United States, 430 U.S. 188 (1977)	7
Meyer v. Nebraska, 262 U.S. 390 (1923)	19
Monell v. Department of Social Services, 436 U.S. 658 (1978)	12
Moore v. City of East Cleveland, 431 U.S. 494 (1977)	19
Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)	10, 11
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	18
National League of Cities v. Usery, 426 U.S. 833 (1976)	16
New York v. Quarles, 467 U.S. 649 (1984)	12
Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990)	5
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	10
Payne v. Tennessee, 111 S. Ct. 2597 (1991)	12, 15
Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)	12
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	18, 20
Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991), *cert. granted in part*, 60 U.S.L.W. 3498 (U.S. January 21, 1992)	7, 8
Planned Parenthood v. Danforth, 428 U.S. 52 (1976)	5
Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983)	5
Poe v. Ullman, 367 U.S. 497 (1961)	25
Poelker v. Doe, 432 U.S. 519 (1977)	5
Rhode Island v. Innis, 446 U.S. 291 (1980)	11
Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)	7

TABLE OF AUTHORITIES—Continued

	Page
Roe v. Wade, 410 U.S. 113 (1973)	2
Runyon v. McCrary, 427 U.S. 160 (1976)	11
Rust v. Sullivan, 111 S. Ct. 1759 (1991)	5
Schloendorff v. Society of New York Hospital, 105 N.E. 92 (N.Y. 1914)	18
Screws v. United States, 325 U.S. 91 (1945)	18
Simopolous v. Virginia, 462 U.S. 506 (1983)	5
Skinner v. Oklahoma, 316 U.S. 535 (1942)	18, 20
Sojourner, T. v. Roemer, 772 F. Supp. 930 (E.D. La. 1991)	28
Swift & Co. v. Wickham, 382 U.S. 111 (1965)	25
Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986)	*passim*
United States v. Nordic Village, 60 U.S.L.W. 4159 (U.S. February 25, 1992)	8
Vasquez v. Hillery, 474 U.S. 254 (1986)	10
Webster v. Reproductive Health Services, 492 U.S. 490 (1989)	*passim*
Welch v. Texas Department of Highways & Public Transportation, 483 U.S. 468 (1987)	10, 12
Whalen v. Roe, 429 U.S. 589 (1977)	19
Williams v. Florida, 399 U.S. 78 (1970)	11
Williams v. Zbaraz, 448 U.S. 358 (1980)	5
Winston v. Lee, 470 U.S. 753 (1985)	24
Zablocki v. Redhail, 434 U.S. 374 (1978)	19

BOOKS, ARTICLES, AND MISCELLANEOUS

Bruce Ackerman, *We The People: Foundations* (1991)	18
Berger, *et al., Maternal Mortality Associated With Legal Abortion in New York State: July 1, 1970-June 30, 1972*, 43 J. Obstet. & Gynec. 315 (1974)	28
Cates, *Legal Abortion: The Public Health Record* 215 Science 1586 (1982)	28
Cates & Rochat, *Illegal Abortions in the United States, 1972-74*, 8 Fam. Plan. Persp. 86 (1976)	28
Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422 (1988)	12, 14

TABLE OF AUTHORITIES—Continued

Page

Henshaw *et al., Abortion Services in the United States 1984 and 1985*, 19 Fam. Plan. Persp. 63 (1987) 26
Jerold Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211 11
John Kaplan, *Abortion as a Vice Crime: A "What If" Story*, 51 Law & Contemp. Probs. No. 1, 151 (1988) 27
LeBolt *et al., Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 JAMA 188 (1982) 23-24
Henry Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988) 10, 25
Placet & Taffel, *Recent Patterns in Caesarean Delivery in the United States*, 15 Obstet. Gynec. Clin. N.A. 607 (1988) 24
Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989) 16
Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571 (1987) 11
Note, *Constitutional Stare Decisis*, 103 Harv. L. Rev. 1344 (1990) 17
Correction Officials Fined Over Abortions, New York Times, October 4, 1989, at B2, col. 5 23
Irish Court Says Girl Can Leave to Obtain Abortion in Britain, New York Times, February 27, 1992, at A1, col. 1 27
7 Contend Correction Dept. Urged Abortions for Guards, New York Times, May 24, 1989, at B3, col. 1 23
Transcript of Oral Arguments Before Court on Abortion Case, New York Times, April 27, 1989, at B12, col. 5 23
Brief of United States as *Amicus Curiae*, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 91-744, 91-902

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA,
REPRODUCTIVE HEALTH AND COUNSELING CENTER,
WOMEN'S HEALTH SERVICES, INC.,
WOMEN'S SUBURBAN CLINIC,
ALLENTOWN WOMEN'S CENTER, and
THOMAS ALLEN, M.D.,
on behalf of himself and all others similarly situated,
Petitioners,

v.

ROBERT P. CASEY, N. MARK RICHARDS, and
ERNEST D. PREATE, JR.,
personally and in their official capacities,
Respondents.

**On Writs of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF FOR REPRESENTATIVES DON EDWARDS, PATRICIA SCHROEDER, LES AUCOIN, VIC FAZIO, BILL GREEN AND CONSTANCE A. MORELLA; SENATORS ALAN CRANSTON, BOB PACKWOOD, HOWARD METZENBAUM, JOHN CHAFEE, TIMOTHY E. WIRTH, WILLIAM S. COHEN, BROCK ADAMS, AND BARBARA MIKULSKI; AND CERTAIN OTHER MEMBERS OF THE CONGRESS OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE* [1]

Amici are a bipartisan group of members of the United States Congress who share a concern for the stability and integrity of our system of constitutional government. We believe that if the system is to work, certain fundamental rights of individuals must be insulated from the shifting winds of politics. We also believe that the doctrine of *stare decisis* plays a leading role in fostering confidence in government by reassuring citizens that their fundamental rights, once secure, will not lightly be discarded. *Stare decisis* concerns are strongly implicated by this case, as it calls directly into question the continued validity of the constitutional principles governing a woman's decision whether to have an abortion—principles that were established in *Roe v. Wade*, applied the same day in *Doe v. Bolton*, and have been relied upon by this Court in more than a dozen cases since. We believe that the abandonment of those principles would weaken the foundations of other fundamental rights, and subject intimate personal decisions of millions of women to government interference under a patchwork of conflicting state and local laws. Our concern with the constitutional protection of individual rights and with the preservation of the rule of law lead us to urge this Court to reaffirm the principles of *Roe v. Wade*.[2]

SUMMARY OF ARGUMENT

In *Roe v. Wade*,[3] this Court established two basic constitutional principles: first, that a woman's right to decide whether to terminate a pregnancy is a fundamental liberty; and second, that laws that infringe on that liberty must be subjected to the most exacting judicial scrutiny. Applying those principles in previous cases, this Court

---

[1] A list of the *amici* appears in the appendix to this brief.

[2] The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

[3] 410 U.S. 113 (1973).

has struck down laws that essentially mirror the Pennsylvania statute at issue here. Accordingly, the doctrine of *stare decisis*—which counsels adherence to precedent—should compel the Court to apply *Roe*'s principles again, and strike down this statute as well.

The Court of Appeals erroneously concluded that *stare decisis* concerns are not implicated here because, in its view, this Court abandoned the principles of *Roe* in *Webster v. Reproductive Health Services*.[4] But neither in *Webster* nor in any other case has a majority of this Court joined an opinion rejecting the principles of *Roe*. Those principles remain the law of the land today, and thus are still entitled to respect under *stare decisis*.

Stare decisis concerns apply with particular force in this case. A ruling from this Court rejecting the principles of *Roe* after a marked transformation in the membership of the Court would shake confidence in government institutions and undermine faith in the rule of law. More importantly, such a ruling would profoundly disturb the settled expectations of millions of women who have come to regard *Roe* as firmly and properly embedded in our law. To discard the principles of *Roe* would be to embark on a novel adventure in constitutional adjudication: never before has this Court overruled a precedent around which so many citizens have built deep-seated reliance interests that affect the most personal, intimate, and life-shaping choices that one can ever make.

There are no justifications for ignoring the dictates of *stare decisis* in this case. First, *Roe* did not emanate from a constitutional void: its principles are entirely consistent with what preceded and what has followed. Second, *Roe* has not proven unsound in principle or unworkable in practice. There is no legitimate basis by which *Roe*'s principles can be distinguished from the steady line of precedents recognizing that individuals have a fundamental constitutional right to make sensitive

---

[4] 492 U.S. 490 (1989).

decisions for themselves regarding procreation, childrearing, marriage, and family formation. Indeed, to single out *Roe* and overrule it would threaten the stability of those other aspects of liberty and privacy. Finally, the withdrawal of the uniform constitutional standard of *Roe* would have harsh consequences: a myriad of conflicting state and local laws will continuously subject the health and lives of women throughout the country to the vagaries of the political process.

For two decades, *Roe v. Wade* has been part of the fabric of our national law, permitting all women to live secure in the knowledge that difficult and personal reproductive choices will be theirs to make. And so it should remain: the freedom to make one's own decisions about whether to become pregnant and whether to carry a pregnancy to term should continue to be a national right secured to every American woman.

ARGUMENT

I. *STARE DECISIS* CONCERNS ARE IMPLICATED BY THIS CASE BECAUSE THE CONTINUED VALIDITY OF THE CONSTITUTIONAL PRINCIPLES ESTABLISHED IN *ROE v. WADE* ARE DIRECTLY AT ISSUE

At issue in this case is the continued validity of *Roe v. Wade* as a constitutional precedent. At its narrowest level, *Roe* stands for the proposition that it is unconstitutional for a state to enforce a statute criminalizing virtually all abortions. If this were all that *Roe* stood for, it would not necessarily be called into question by this case.[5]

The more profound importance of *Roe*, however, lies in the basic constitutional principles it established: first, that the freedom of a woman to decide for herself whether

---

[5] *Cf. Webster v. Reproductive Health Servs.*, 492 U.S. 490, 521 (1989) (plurality opinion) (Missouri law that did not impose broad criminalization of abortion afforded "no occasion to revisit the holding of *Roe*" striking down a Texas criminal statute).

or not to terminate a pregnancy is a fundamentally important constitutional liberty; and second, that state laws that infringe on that liberty prior to fetal viability must be subjected to "strict scrutiny"—the most demanding standard of constitutional review—and are permissible only if they genuinely promote maternal health.

On the same day that this Court decided *Roe*, it applied those same constitutional principles in the companion case of *Doe v. Bolton*,[6] and invalidated pre-viability abortion restrictions in Georgia that were based on a model penal code used nationwide. Those restrictions, which included a provision that a woman's decision to have an abortion was subject to review by a "hospital committee," were not as severe as the criminal prohibitions of the Texas statute in *Roe*. But this Court held them unlawful under the principles announced in *Roe*.

In the two decades since *Roe* and *Doe*, this Court has addressed the constitutionality of a wide variety of abortion restrictions in more than a dozen cases.[7] In some of these cases, the restrictions were struck down; in others, they were upheld. But in every case, a majority of this Court stated that it was applying the principles of *Roe* in arriving at the ultimate result.

---

[6] 410 U.S. 179 (1973).

[7] *Connecticut v. Menillo*, 423 U.S. 9 (1975); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *Simopolous v. Virginia*, 462 U.S. 506 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

The Pennsylvania statute challenged in this case is remarkably similar to another Pennsylvania statute that the Court has already held unconstitutional under the principles of *Roe* in *Thornburgh v. American College of Obstetricians and Gynecologists*.[8] Indeed, the law at issue here is a virtual copy of that earlier Pennsylvania law.[9] Because there is no way to distinguish one from the other, the new statute can stand only if *Roe* and its progeny fall. Thus, the continued validity of the core constitutional principles of *Roe* is very much in question here, and the doctrine of *stare decisis* necessarily bears on the resolution of this case.[10]

The Court of Appeals nonetheless claimed that it was not constrained by *stare decisis* because, in its view, *Roe* had been implicitly overruled in *Webster v. Reproductive Health Services*,[11] even though no single opinion in that

---

[8] 476 U.S. 747 (1986). *Thornburgh* is not the only case in which this Court has invalidated restrictions that parallel those of the current Pennsylvania law. Even before *Thornburgh*, this Court had struck down an Ohio law that, like the Pennsylvania laws at issue in *Thornburgh* and in this case, forced a woman to be subjected to a battery of government-scripted information about abortion before she was allowed to exercise her constitutional right to terminate her pregnancy. *See Akron*, 462 U.S. at 442-49.

[9] Of the parts of the Pennsylvania law that have been challenged in this case, the only one not at issue when this Court struck down the earlier Pennsylvania law was the "husband notification" provision.

[10] To uphold the current Pennsylvania law without rejecting the principles of *Roe* itself, this Court would have to assert that *Thornburgh* and *Akron* were wrongly decided, and overrule them as misapplications of *Roe*. But to do so would fail to give the respect that is due *Roe*'s progeny under the doctrine of *stare decisis*. Moreover, it would, in effect, entail a rejection of *Roe*. As a practical matter, to overrule precedents that have applied *Roe* in striking down abortion restrictions that mirror those at issue in this case would be to read *Roe* at its narrowest: a case that involved only the constitutionality of near-blanket criminal laws, rather than a case that established a set of core constitutional principles.

[11] 492 U.S. 490 (1989).

case commanded five votes, and even though a majority of the Court in that case did not assert that *Roe* had been or should be overruled. In reaching its conclusion, the Court of Appeals purported to apply to *Webster* the rules of *Marks v. United States* [12] for identifying the "controlling opinion" of this Court when no one opinion "enjoys the assent of five Justices." [13] According to the Court of Appeals, the teachings of *Marks* pointed to Justice O'Connor's concurrence as the controlling opinion in *Webster*. Moreover, the Court of Appeals concluded, this concurrence had the effect of reversing *Roe*.[14]

The Court of Appeals' conclusion reflects a misreading of *Webster* and a misapplication of *Marks*.[15] Roe is still standing, even after the recent assault on its foundations. Only four Justices in *Webster* advocated abandoning the principles of *Roe*. The fifth vote to sustain the Missouri law at issue in *Webster* was supplied by Justice O'Connor, who found it unnecessary to reexamine the validity of *Roe*'s principles because she perceived "no conflict" between them and the Missouri law.[16] For Justice O'Connor, *Webster* could be decided simply by applying *Roe*. To be sure, in dissenting opinions in cases prior to *Webster*, Justice O'Connor had articulated the "undue burden" test for assessing pre-viability restrictions on abortion. Under that test, strict scrutiny is triggered only after a threshold showing of a burden on the exercise of a

---

[12] 430 U.S. 188 (1977).

[13] *Id.* at 193.

[14] *See Planned Parenthood v. Casey*, 947 F.2d 682, 698 (3d Cir. 1991), *cert. granted in part*, 60 U.S.L.W. 3498 (U.S. Jan. 21, 1992).

[15] It also contradicts the cardinal tenet that it is not for a lower court to declare that a Supreme Court decision has been overruled until this Court has expressly said so. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

[16] *See Webster*, 492 U.S. at 525, 530 (O'Connor, J., concurring).

woman's right to choose to have an abortion.[17] In *Webster*, however, Justice O'Connor referred only in passing to the "undue burden" inquiry, and stated that it was "more to the point" that the Missouri law satisfied the strict scrutiny standard of *Roe*, regardless of whether the law satisfied the "undue burden" standard as well.[18]

Even if the Court of Appeals was right to read Justice O'Connor's *Webster* concurrence as having abandoned *Roe*, its application of *Marks* and elevation of the concurrence to the "law of the land" [19] was wrong. The *Marks* rule for locating the controlling opinion of this Court when the majority is split can work "only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning . . . ." [20] That does not describe the relationship between Justice O'Connor's opinion in *Webster*, even as misread by the Court of Ap-

---

[17] *See Thornburgh*, 467 U.S. at 828 (O'Connor, J., dissenting); *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting).

[18] Nor did Justice O'Connor's opinion in *Hodgson*—or any of the other Justices' opinions in *Hodgson*—reshape the constitutional terrain charted by *Roe*. In *Hodgson*, Justice O'Connor said only that she found one part of the law at issue to be unconstitutional because it amounted to an "undue burden" on a woman's right to choose abortion. *See Hodgson*, 110 S. Ct. at 2949-50 (O'Connor, J., concurring). The Court of Appeals construed this to mean that Justice O'Connor had definitively rejected *Roe*. *See* 947 F.2d at 696-97. But to conclude from a brief reference in a concurring opinion that Justice O'Connor intended to make new law is at odds with her firm statement in *Webster* that when it is time to reexamine *Roe*, it must be done "carefully." *Webster*, 492 U.S. at 526 (O'Connor, J., concurring).

[19] 947 F.2d at 698.

[20] *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). This Court held just last week that a prior decision was not controlling in a subsequent case because in the earlier decision, the plurality and dissent were evenly divided with respect to a particular issue, and the concurring Justice—who cast the fifth vote in support of the judgment—had not addressed that issue at all. *See United States v. Nordic Village*, 60 U.S.L.W. 4159 (U.S. February 25, 1992).

peals, and the opinions of the other four Justices who voted to uphold the Missouri law: based on the views they expressed in *Webster*, the other Justices would not agree that a test at least as rigorous as the "undue burden" test should be applied to laws that limit a woman's decision whether to have an abortion. In fact, in *Webster* they signaled their belief that all abortion restrictions should be assessed under the lenient "rational basis" test. Under that test, any law will generally pass muster, regardless of the degree of burden imposed on constitutional rights. Simply put, even if the "undue burden" approach had been employed by Justice O'Connor in *Webster*, it would not represent a position upon which the Justices who formed the *Webster* majority agree. Thus, *Marks* is inapposite here.[21]

In the final analysis, *Webster* is analogous to cases in which a divided 4-4 Court affirms a lower court judgment and maintains the status quo. Therefore, the constitutional principles of *Roe* remain the law of the land. And as such, those principles will continue to be entitled to respect under the doctrine of *stare decisis* unless and until a majority of that Court expressly rejects them.

II. *STARE DECISIS* CONCERNS STRONGLY COUNSEL ADHERENCE TO THE CONSTITUTIONAL PRINCIPLES ESTABLISHED IN *ROE v. WADE*

A. *Stare Decisis* Fosters Respect For The Rule of Law and Government Institutions, and Preserves the Settled Expectations and Practices of Individuals Who Have Relied on Court Precedent in Ordering Their Lives

As this Court has recognized "time and time again," [22] the doctrine of *stare decisis* has earned a special niche in

---

[21] Even if it could be said that Justice O'Connor's *Webster* concurrence is a subset of the *dissenting* opinions in *Webster*, the *Marks* rule would still be of no utility in this case, because this Court has never used *Marks* to manufacture a controlling opinion out of dissents. *See King v. Palmer*, 950 F.2d at 783.

[22] *Hilton v. South Carolina Pub. Ry. Comm'n*, 112 S. Ct. 560, 563 (1991).

the American system of government. By mandating respect for established judicial precedents, *stare decisis* helps to ensure that our society is governed by the steady rule of law, rather than by "arbitrary discretion." [23] In that role, *stare decisis* serves two vital functions.

First, *stare decisis* helps to promote the legitimacy of governmental institutions. As this Court has repeatedly acknowledged, the evenhanded and consistent application of the rule of law "contributes to the integrity of our constitutional system of government, both in appearance and in fact." [24] Public confidence in the system is shaken when the law is seen as fluctuating on the basis of vagary and whim. In Justice Harlan's words, *stare decisis* is critical to the maintenance of "public faith in the judiciary as a source of impersonal and reasoned judgments." [25]

This trust-building function of *stare decisis* looms even larger in cases that invite the reconsideration of a long-standing precedent after a marked transformation in the composition of the Court. As Justice Frankfurter observed, the respect for precedent that is mandated by *stare decisis* demonstrates "the wisdom of this Court as

---

[23] *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *The Federalist* No. 78, at 490 (H. Lodge ed. 1888) (A. Hamilton)). *See Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 478-79 (1987) (plurality opinion) ("[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*.").

[24] *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

[25] *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). *See Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring) ("Citizens must have confidence that the rules on which they rely in ordering their affairs . . . are rules of law and not merely the opinions of a small group of men who temporarily occupy high office."); *see also* Henry Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 752 (1988) ("A general judicial adherence to constitutional precedent supports a consensus about the rule of law, specifically the belief that all organs of government, including the Court are bound by the law.").

an institution transcending the moment." [26] Accordingly, departure from precedent after the membership of the Court has been dramatically altered can only "raise doubts both as to the Court's impersonality and as to the principled foundations of its decisions." [27] The institutional authority and legitimacy of the Court may actually be enhanced in the long run if, at a critical juncture, it stands behind such a precedent, and is ultimately vindicated when the once controversial decision becomes widely regarded as firmly and properly embedded in our law.[28]

The second function of *stare decisis* is to foster reliance on judicial decisions. The stable and predictable application of precedent helps guide the conduct of everyday life throughout the country: citizens can plot their affairs "with assurance against untoward surprise," [29] and other

---

[26] *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting).

[27] Jerold Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 218.

[28] *See Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955) ("[T]he vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them."); *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) (stressing importance of adhering to *Brown* in light of appointment of "three new Justices" all of whom were "at one with the Justices still on the Court who participated in [*Brown*]"); *see also Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring) (noting that after initial controversy, "[t]he meaning" of *Miranda v. Arizona*, 384 U.S. 436 (1966), [had] "become reasonably clear and law enforcement practices [had] adjusted to its strictures"); *Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring) (acknowledging that principles articulated in the controversial civil rights decision, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), had become "part of the fabric of our law" during the intervening years, and thus were entitled to respect under *stare decisis*).

[29] *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). *See Williams v. Florida*, 399 U.S. 78, 127 (1970) (Harlan, J., concurring in part and dissenting in part) (*stare decisis* promotes the "predictability required for the ordering of human affairs over the course of time"); Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 597 (1987) (*stare decisis* "helps us plan our

branches of government—at all levels—can chart the nation's agenda "against the background of known rules." [30] *Stare decisis* thus reflects a common sense notion that the judiciary should not be in the habit of disturbing "the settled practices and expectations of a democratic society." [31] Prudence and caution are the watchwords that *stare decisis* impresses upon this Court when the reversal of a precedent will uproot the moorings around which "individuals may have arranged their affairs." [32]

B. *Stare Decisis* Concerns Apply with Special Force to *Roe v. Wade*

However one might have initially approached the constitutionality of government restrictions on abortion, the Court no longer "write[s] on a clean slate." [33] The question in this case, therefore, is not reducible to whether *Roe* and the decisions applying it were wrongly decided. Instead, when looking at *Roe* and its progeny now, this Court must do so against the backdrop of *stare decisis*—which this Court has already found to provide "especially compelling reasons" for continued adherence to *Roe*.[34]

---

lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown").

[30] Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 430 (1988). *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 35 (1989) (Scalia, J., concurring in part and dissenting in part) (Supreme Court precedent can have a "pervasive effect on statutory law," and governmental bodies "legislate [] under [the] assurance" that develops around precedent).

[31] *Payne v. Tennessee*, 111 S. Ct. 2597, 2614 (1991) (Scalia, J., concurring).

[32] *Monell v. Department of Social Servs.*, 436 U.S. 658, 700 (1978) (quoting *Monroe v. Pape*, 365 U.S. 167, 221-22 (1961) (Frankfurter, J., dissenting)).

[33] *Welch*, 483 U.S. at 493; *see also New York v. Quarles*, 467 U.S. 649, 660 (1984) (O'Connor, J., concurring in part and dissenting in part) (Because *Miranda* is "now the law," the Court no longer is "writing from a clean slate").

[34] *Akron*, 462 U.S. at 420 n.1.

As a matter of institutional legitimacy, this Court should be reluctant to overturn *Roe*. A concern for the Court's integrity resonates in Justice's Powell's majority opinion in *Akron*—a case in which the Court was asked, but refused, to abandon *Roe*. Stressing the "special care" with which the Court originally decided *Roe*, Justice Powell noted that the case "was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term." Justice Powell also thought it salient that "the decision was joined by THE CHIEF JUSTICE and six other Justices." [35] Finally Justice Powell emphasized that the Court had continuously applied *Roe* for over a decade, thus creating an imposing legacy of case law [36]—a legacy that obviously has only grown in the decade since *Akron*.

At the same time, the years since *Akron* have been a period of flux on the Court. The strong *Roe* majority to which Justice Powell referred has contracted. In the past six years alone, four of the Justices who were part of the *Roe* majority have left the Court; only one Justice from that majority remains on the Court today. To renounce *Roe* in the wake of this change in the composition of the Court would be to undermine faith in this Court as an impartial arbiter of constitutional rights.

The second function of *stare decisis*—its role in safeguarding settled expectations and practices—weighs even more powerfully in favor of continued fidelity to *Roe*. Few opinions of this Court have had such a profound impact on the lives of so many.[37] Millions of women have come to count on *Roe*. Because of *Roe*, they are secure in the knowledge that if they should ever be confronted with one of the most difficult and intimate choices that a woman can ever make—whether or not to have an abortion—the choice is theirs to make, free from the shifting

---

[35] *Id.*

[36] *See id.* (citing decisions applying *Roe*).

[37] In that regard, *Roe* may be matched only by *Brown v. Board of Education*, 347 U.S. 483 (1954).

proclivities of government. Because of *Roe*, they are secure in the knowledge that if they do choose to have an abortion, the procedure will generally be safe and legal. And because of *Roe*, they have been better able to shape their lives and futures, and to participate equally in our society.[38]

It is said that *stare decisis* is not "an inexorable command" in constitutional cases, and that the doctrine has more potency in cases involving statutory construction.[39] Whatever force that axiom carries,[40] this Court has already considered its application to *Roe* and concluded that *Roe* is fully entitled to *stare decisis* respect. Justice Stevens put it succinctly in *Thornburgh*:

> [t]he fact that the doctrine of *stare decisis* is not an absolute bar to the reexamination of past interpretations of the Constitution [does not] mean that the values underlying that doctrine may be summarily put to one side. There is a strong public interest in stability, and in the orderly conduct of our affairs,

---

[38] With the freedoms that *Roe* granted has come a moral obligation to take responsibility for the choices made. Arguments for restrictions on abortion frequently reflect, implicitly or explicitly, the view that women are not fully capable of making such ethical decisions. That stereotyped assumption, which is a product of a "long and unfortunate history of sex discrimination," *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion), no longer has a place in this Court's jurisprudence or in any of our nation's laws.

[39] *See Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting).

[40] At least one prominent scholar and jurist has questioned its validity:

> I doubt that judges should be any more ready to unravel long-standing constitutional doctrines than they should be to revise long-standing statutory interpretations. Indeed, things should work the other way. Precisely because constitutional rules establish governmental structures, because they are the framework for all political interactions, it ought to be *harder* to revise them than to change statutory rules.

Easterbrook, *supra*, at 431 (emphasis in original).

that is served by a consistent course of constitutional adjudication.[41]

Justice Stevens' admonition reflects an understanding that where individuals have built firm and legitimate reliance interests around a constitutional precedent, *stare decisis* deserves to be applied with at least as much vigor as in the non-constitutional setting. Accordingly, for purposes of evaluating the relative strength of *stare decisis* concerns, a distinction can be drawn between types of constitutional precedents.

This Court stated only last Term that constitutional precedents involving "procedural and evidentiary rules" may more readily be abandoned than other constitutional precedents, because it is harder to identify any widespread reliance interests that have developed around them.[42] Thus, the Court felt less inhibited when overruling its opinions that had prohibited the introduction of "victim impact" statements in murder trials. The Court determined that reversal of those rulings did not implicate any serious reliance interest concerns: those affected by the Court's decision could not legitimately be heard to complain that they had ordered their affairs—or to put it more bluntly, had chosen a particular course of criminal conduct—on the expectation that evidence concerning the victims of their crimes would not be introduced at their trials.[43] Similarly, the recent overruling of this Court's "coerced confession" [44] and "car search" [45] precedents did not, in the Court's view, directly affect any settled expectations and practices in the country at large. It would be difficult indeed to show that citizens made

---

[41] *Thornburgh*, 476 U.S. at 780-81 (Stevens, J., concurring).

[42] *Payne*, 111 S. Ct. at 2610.

[43] *Id.* (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

[44] *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991) (overruling in part *Chapman v. California*, 386 U.S. 18 (1967)).

[45] *California v. Acevedo*, 111 S. Ct. 1982 (1991) (overruling *United States v. Ross*, 456 U.S. 798 (1982)).

basic, day-to-day and life-shaping decisions based on those precedents.[46] The same could not be said, however, if this Court were to reverse *Roe*, and no longer protect as fundamental the right upon which women have relied in making "decisions that have a profound effect on their destin[ies]." [47]

The reliance interests that evolve from rulings of this Court recognizing fundamental, personal rights may explain an important historical phenomenon in the area of *stare decisis*: this Court has *never* overruled a precedent that recognized a constitutional liberty of the type that was established in *Roe*.[48] It is one thing for this Court to find a constitutional right where one did not previously exist, or to refuse to recognize a right in the first instance, or to decline to expand the contours of a right. But it is another thing for the Court to take away a right wholesale, defeating the expectations and practices of millions of citizens who have come to rely on the prece-

---

[46] Differences in the degree and nature of reliance interests also distinguish *Roe* from the series of opinions in which this Court overruled one Tenth Amendment precedent and subsequently restored it. In those cases, the Court was not directly affecting the everyday conduct of individuals, but merely adjusting the relationship between governmental units in specific types of regulatory matters. *See National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities*).

[47] *Thornburgh*, 476 U.S. at 781 (Stevens, J., concurring).

[48] This Court's eventual repudiation of *Lochner v. New York*, 198 U.S. 45 (1905), is not to the contrary. *Lochner* involved the rights of individuals to run their businesses as they saw fit. True, overruling *Lochner* upset certain expectations. But taking away the right to make one's employees labor for more than 60 hours a week is just not the same as taking away the right to make basic life choices about intimate personal relationships, which the overruling of *Roe* would entail. *See* Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 806 (1989) (minimum wage and hour laws that were upheld after *Lochner* was overruled did not "positively take over and redirect [the] lives" of those whose rights were circumscribed).

dent establishing the right, and of other branches of government—such as Congress—that have acted or refrained from acting in reliance on that precedent as well. The Court would, in sum, be embarking on a novel adventure in constitutional adjudication if it overruled *Roe*.[49]

III. THERE IS NO JUSTIFICATION FOR DEPARTING FROM *STARE DECISIS* AND ABANDONING THE CONSTITUTIONAL PRINCIPLES OF *ROE v. WADE*

Notwithstanding the institutional legitimacy and reliance interest considerations that make *stare decisis* concerns so compelling in this case, this Court could discard the principles of *Roe* if it could be shown that they (a) have been undermined by subsequent developments;[50] (b) have proven "unsound in principle and unworkable in practice;"[51] or (c) have been attended by "particularly unfortunate consequences," and their abandonment would have beneficial results.[52] No such showing can be made.

A. *Roe v. Wade* Has Not Been Undermined by Subsequent Developments

Roe has not been undermined by developments in the law.[53] That justification for overruling a precedent exists

---

[49] Moreover, the evisceration of one fundamental personal liberty would degrade the entire concept of "fundamental rights," and cast doubt on the stability of all such rights. *See* Note, *Constitutional Stare Decisis*, 103 Harv. L. Rev. 1344, 1361 (1990).

[50] *See Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting); *Hudgens v. NLRB*, 424 U.S. 507 (1976).

[51] *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

[52] *Canada Packers, Ltd. v. Atchison, T. & S.F. Ry.*, 385 U.S. 182, 184 (1966) (per curiam).

[53] Nor have there been any changes in social conditions that would undermine *Roe*. The prime example of changed social conditions justifying the reversal of precedent is the repudiation of *Lochner v. New York*, 198 U.S. 45 (1905). No one can dispute that *Lochner*—and the whole era of jurisprudence which it represented—became outmoded over time. When the nation adjusted to

when the precedent has become a "sport in the law . . . inconsistent with what preceded and what followed." [54] Last Term's decision in *Harmelin v. Michigan* [55] reflected the most recent variation on this theme. There, the Court said that it was not bound to follow a precedent that "was scarcely the expression of clear and well accepted constitutional law," and was in "apparent tension with other decisions." [56]

Roe, however, followed from a long line of decisions of this Court recognizing fundamental rights in procreation,[57] childrearing,[58] marriage,[59] and contraceptive choice.[60] *Roe* also was rooted in a venerable common law tradition that "every human being of adult years and sound mind has a right to determine what shall be done with his own body." [61] Moreover, *Roe* has stood the test of time: this Court "repeatedly and consistently has accepted and applied" *Roe*'s principles in its subsequent abortion cases.[62] For years, this Court has been asked

---

a changed world, so too did this Court. *See* Bruce Ackerman, *We the People: Foundations* 63-66 (1991); *see also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (modifying construction of Commerce Clause in light of changed economic conditions).

[54] *Screws v. United States*, 325 U.S. 91, 112 (1945) (plurality opinion). *See also Hudgens v. NLRB*, 424 U.S. 507 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

[55] 111 S. Ct. 2680 (1991).

[56] *Id.* at 2686 (opinion of Scalia, J.); *see id.* at 2703 (Kennedy, J., concurring) (Eighth Amendment precedent that was overruled in *Harmelin* had "appeared to apply a different analysis" than the analysis employed in all other Eighth Amendment cases).

[57] *See Skinner v. Oklahoma*, 316 U.S. 535 (1942).

[58] *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[59] *See Loving v. Virginia*, 388 U.S. 1 (1967).

[60] *See Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[61] *Schloendorff v. Society of New York Hosp.*, 105 N.E. 92, (N.Y. 1914) (Cardozo, J.).

[62] *Akron*, 462 U.S. at 420 n.1.

to jettison those principles, but has yet to do so. Finally, *Roe* has influenced constitutional developments beyond the abortion context. The principles of *Roe* inhere in this Court's later rulings supporting the fundamental rights of individuals to make other sensitive decisions regarding contraception,[63] and personal living arrangements and family life.[64] *Roe* has also provided support for the right of individuals to withhold certain personal information from the government.[65] In short, it cannot be claimed that *Roe* is "inconsistent with what preceded and what followed."

B. *Roe* is Neither "Unsound In Principle" Nor "Unworkable In Practice"

1. *The Principles Established in* Roe *are Sound, and Cannot be Rejected Without Imperiling Other Aspects of Privacy and Liberty*

The soundness of *Roe* as a matter of principle can be demonstrated in two ways. First, as already emphasized, *Roe* flowed from a steady stream of precedents recognizing that the Due Process Clause of the Fourteenth Amendment protects certain fundamentally important liberties.[66] The freedom that enables individuals to make their own choices about matters of reproduction and family formation is soundly grounded in this constitutional protection of liberty. Dating back to *Meyer v. Nebraska*[67]

---

[63] *Carey v. Population Servs. Int'l.*, 431 U.S. 678 (1977).

[64] *See Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

[65] *See Whalen v. Roe*, 429 U.S. 589 (1977).

[66] The idea that the Due Process Clause should be limited to guaranteeing procedural fairness has long since been rejected: "*the cases are legion* in which [the Due Process Clauses of the Fifth and Fourteenth Amendments] have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription." *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (emphasis added).

[67] 262 U.S. 390 (1923).

in 1923 and *Pierce v. Society of Sisters*[68] in 1925, this Court has recognized that a couple's decision about how to raise and educate their children is a fundamental liberty. From the time of *Skinner v. Oklahoma*[69] in 1942, this Court has recognized that a state needs an extraordinary justification for its acts to control a person's reproductive functions. In *Loving v. Virgina*[70] in 1967, this Court recognized that these principles protect the liberty of individuals to decide whether and whom to marry. In *Griswold v. Connecticut*[71] in 1965, this Court recognized that the freedom to decide whether or not to conceive children was a fundamental right. And in *Eisenstadt v. Baird*[72] in 1972, this Court held that fundamental liberties in matters of conception precluded the government from imposing barriers to access to contraceptives.

Second, this Court is presumably not prepared to overturn six decades of precedent recognizing that the Constitution guarantees the right of individuals to make choices about reproduction and family formation. If that is true, then the burden is on those who would single *Roe* out for reversal—while maintaining those other precedents—to show that a woman's decision whether to have an abortion is not of the same magnitude as the other decisions that individuals have a fundamental right to make. Efforts by members of this Court even to begin to meet that burden have been scattered.[73] The four Justices in *Webster* who advocated the abandonment of *Roe*'s principles offered no

---

[68] 268 U.S. 510 (1925).

[69] 316 U.S. 535 (1942).

[70] 388 U.S. 1 (1967).

[71] 381 U.S. 479 (1965).

[72] 405 U.S. 438 (1972).

[73] The dissents of Justice White in *Roe* and *Thornburgh*, and of then-Justice Rehnquist in *Roe*, represent the only real effort to articulate distinctions between the principles of *Roe* and the principles of this Court's other fundamental rights precedents.

basis for distinguishing the right to choose to have an abortion from other fundamental rights in matters of reproduction and family formation. We submit that there is no principled basis for making any such distinction.

As a threshold matter, none of the other liberties which the Court has held to be fundamental is explicitly mentioned in the text of the Constitution. Indeed, since the Fourteenth Amendment does not specify any particularized liberties, protecting only those aspects of liberty that are specifically described would not preserve *any* of this Court's fundamental liberty precedents.[74] Thus, the fact that the Constitution does not mention abortion fails to distinguish *Roe* from this Court's other fundamental liberties precedents.

More importantly, all of the fundamental liberties in matters of reproduction and family formation are interconnected, and all go to the heart of personal freedom. If, for example, the right to make sensitive decisions with respect to conception established in *Griswold* means anything, it must mean that women have the right to make the most critical of decisions regarding their reproductive capacities—the decision whether to terminate a pregnancy. Indeed, as Justice Stevens has forcefully stated, it is difficult "to see how a decision on childbearing becomes *less* important the day after conception than the day before." [75]

---

[74] Any attempt to limit fundamental liberties to those for which there is a historical tradition of protection at the "most specific level" would be contrary to the Court's decisions in cases such as *Loving v. Virginia*, which struck down state laws forbidding interracial marriage. Before *Loving*, there had unquestionably been a long and intensely emotional tradition of *not* allowing interracial marriages. *See Loving*, 388 U.S. at 9-10. It was the Court's understanding of more general constitutional principles—the right to form a family and racial equality—that enabled the Court to find anti-miscegenation laws both a violation of the Equal Protection Clause *and* a violation of the fundamental liberty to marry protected by the Due Process Clause.

[75] *Thornburgh*, 476 U.S. at 776 (Stevens, J., concurring) (emphasis in original). Concerns for potential human life that are

In an effort to convince the Court that *Griswold* could be saved if *Roe* were discarded, the United States argued in *Webster* that the reference in Justice Douglas' opinion to "police search[es] of marital bedrooms for tell-tale signs of the use of contraceptives" [76] means that *Griswold* can be read as a narrow Fourth Amendment search and seizure case.[77] But that bare-bones interpretation of *Griswold* would reduce it to a largely inconsequential decision: if *Griswold* only protects couples from police searches of marital bedrooms, the government would be free to ban the marketing of birth control devices, thereby denying citizens access to birth control—as long as the ban was enforced by means other than searching marital bedrooms. Furthermore, that interpretation of *Griswold* does not square with landmark precedents of this Court recognizing that the right to privacy in matters of conception precludes the government from restricting access to birth control through wide-scale limitations on the sale, manufacture, and distribution of contraceptives.[78]

The inability to decouple *Roe* from *Griswold* and this Court's other precedents curbing government encroachment on reproductive freedom is further amplified by the "forced abortion" question, which was raised in the *Webster* oral argument, and which Justice Stevens touched

---

necessarily implicated in the abortion question do not make pre-conception decisions any less fundamental than post-conception decisions. Those concerns relate only to the question of whether and when a state's assertion of an interest in potential life should constrain or override the right to make post-conception decisions—a question that *Roe* resolved through the proposition that the state's interest becomes more compelling after the point of fetal viability. *See id.* at 776 (Stevens, J. concurring) (concerns for potential life relate to the "difference in the strength of the countervailing state interest").

[76] *Griswold*, 381 U.S. at 485.

[77] *Webster*, Brief of the United States as *Amicus Curiae* at 12 n.9.

[78] *See Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

upon in *Thornburgh*. If the right to choose abortion is anything less than fundamental, states (and perhaps 14,000 local governments) would need only a minimal justification to *require* women to undergo abortions as a matter of the routine exercise of the police power.[79] And if only a rational basis is required to justify such laws, the government could defend them on the grounds that they "rationally" advance objectives such as reducing housing shortages and public school overcrowding.[80] By the same token, "rational" grounds could also be proffered to justify laws that force women to become pregnant in the first place. In both instances, the government would be running roughshod over the right recognized in *Griswold*.[81]

---

[79] "[I]f federal judges must allow the State to make the abortion decision, presumably the State is free to decide that a woman may *never* abort, may *sometimes* abort, or, as in the People's Republic of China, must *always* abort if her family is already too large." *Thornburgh*, 476 U.S. at 778 n.6 (Stevens, J., concurring) (emphasis in original).)

[80] The possibility that some government officials would coerce women into having abortions if *Roe* were overturned is not necessarily farfetched. *See 7 Contend Correction Dept. Urged Abortions for Guards*, New York Times, May 24, 1989, at B3, col. 1 ("Seven present and former New York City Correction officers contended yesterday that the Correction Department regularly told pregnant officers to have abortions or resign."); *see also Correction Officials Fined Over Abortions*, New York Times, October 4, 1989, at B2, col. 5 ("A senior official of New York City's Department of Correction has resigned and four others have been penalized in an investigation into charges that the department has told pregnant correction officers to have abortions or resign.").

[81] The United States argued in *Webster* that even if this Court held that the right to choose an abortion is not a fundamental liberty, it could still strike down a compulsory abortion law as an unconstitutional seizure, because the state would be "violently . . . laying hands on a woman and submitting her to an operation . . . ." *Transcript of Oral Arguments Before Court on Abortion Case*, New York Times, April 27, 1989, at B12, col. 5. This attempt to distinguish between forced abortion and forced childbirth—a far more painful and dangerous procedure than first trimester abortion—is wholly inadequate. *See LeBolt et al., Mortality*

2. Roe *Has Proven No Less Workable in Practice Than Other Constitutional Precedents*

A review of post-*Roe* litigation would show that *Roe*'s principles have been at least as "workable" as other constitutional doctrines. Neither this Court nor the lower courts have encountered any particular problem in applying the common sense principle that prior to fetal viability, a state may regulate abortions to protect a woman's health only when her health interests are genuinely implicated, and not otherwise.[82] That principle has not proven especially difficult to apply, even in the face of regulations that are *deliberately* near to the edge of constitutionality. All areas of constitutional law require courts to make close calls. But the existence of inevitable distinctions at the margin of a constitutional doctrine does not in any way suggest that its underlying principles are unworkable. The constitutional principles of freedom of speech and of the press, for example, are still considered to be workable, notwithstanding cases drawing fine lines between the traditional public forum, the designated public forum, and the non-public forum. Like *Roe*'s viability benchmark, these lines are not themselves "found in text of the Constitution," [83] but no one advocates abandoning them as "unworkable."

---

from Abortion and Childbirth: Are the Populations Comparable?, 248 JAMA 188, 190 (1982). Moreover, in nearly one in four cases, childbirth is by caesarean section. Thus, as a result of restrictive abortion laws, the government would be "submitting" many women to a major surgical procedure. *See* Placet & Taffel, *Recent Patterns in Caesarean Delivery in the United States*, 15 Obstet. Gynec. Clin. N.A. 607 (1988). *Compare Winston v. Lee*, 470 U.S. 753 (1985) (holding unconstitutional a state-compelled surgical procedure to remove a bullet from a criminal suspect).

[82] *Compare Garcia*, 469 U.S. at 539 ("We find it difficult, if not impossible, to identify an organizing principle that places each of the cases [applying *National League of Cities*] in [one] group on one side of a line and each of the cases in the [other] group on the other side.").

[83] *Webster*, 492 U.S. at 518 (plurality opinion).

C. Overruling *Roe* Would Have Profoundly Adverse Consequences

It has been argued that restrictive abortion laws advance the asserted government interest in protecting potential life from the moment of conception. As Justice Harlan admonished, however, "[t]he mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify alone any and every restriction it imposes."[84] In any event, it has not been shown that a return to the pre-*Roe* era would materially serve any such goal. If governments are free to criminalize abortion, or to promulgate regulations placing abortion beyond the reach of most women, the principal consequence will be not the "protection of all potential human life," but rather the substitution of delayed, dangerous and illegal abortions for safe and legal ones. When harmful, rather than beneficial, consequences would attend the overruling of a constitutional precedent, this Court is even more inclined to rely on *stare decisis* and maintain that precedent.[85]

The pernicious consequences of overruling *Roe* are readily apparent. Most dramatically, in states that respond by enacting unyielding criminal statutes, the conduct of scores of law-abiding citizens—pregnant women, doctors, and nurses—could be criminalized overnight. This would lead to widespread disobedience, undermine the effectiveness of the criminal justice system, and promote a general disrespect for the law unprecedented in our two centuries of constitutional jurisprudence.

---

[84] *Poe v. Ullman*, 367 U.S. 497, 545 (1961) (Harlan, J., dissenting).

[85] *See* Monaghan, *supra*, at 758-60; *see also Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) (Court will reconsider precedent in light of its "mischievous consequences"); *Canada Packers, Ltd. v. Atchison, T. & S.F. Ry.*, 385 U.S. at 184 (Court will not reconsider precedent that has not "produced any particularly unfortunate consequences").

Laws that fall short of broad criminal bans could also have severe and harmful ramifications. For example, restricting the reasons for which women may terminate a pregnancy would inevitably lead to the establishment of enforcement mechanisms that would make every woman submit herself to those who would be empowered to ascertain whether her reasons met with official state approval.[86] Even where a state might "approve" a woman's decision, the very process of subjecting her decision to state review could impose an unacceptable barrier to the exercise of her rights. A rape victim's right to abort is by no means fully protected by a statute that prohibits abortion generally, but makes an exception for pregnancy by rape. A rape victim is in a far worse position under such a statute than she is under *Roe*, where a woman who has been raped can make her own decision to abort the resulting pregnancy. If *Roe* is overturned, and a rape victim must rely on a "rape exception" in a statute, she will not have the right to choose abortion, but only the quite different "right" to *prove* to some government officials that she was "in fact" raped—often a difficult and traumatic task. Moreover, even proving that she was raped might not be enough. To come within a rape exception, a woman could also be required to prove that her pregnancy actually *resulted from* the rape and not from some other act of sexual intercourse. Choice would thus be replaced by cross-examination.

Other burdensome restrictions on access to pre-viability abortions, short of an outright ban, would have the practical effect of withdrawing the right recognized in *Roe* from millions of poor and rural women.[87] And for all

---

[86] *See, e.g., Doe v. Bolton*, 410 U.S. 179, 195-98 (1973).

[87] For example, almost 80% of rural Americans live in counties with no abortion services. *See* Henshaw *et al., Abortion Services in the United States 1984 and 1985*, 19 Fam. Plan. Persp. 63, 64-65 (1987). The prospect of a long journey to a distant facility—or, indeed, being forced to undertake such a trip *twice* to satisfy waiting period requirements—would effectively deny many pregnant women access to abortion services. *See Akron*, 462 U.S. at

women, medically unnecessary restrictions would tend to delay abortions to a later point in pregnancy when the procedure is more complicated and dangerous. In such circumstances, states would, ironically, be subjecting women to an enforced reproductive code at great cost to their well-being, while attempting to justify the code "under the guise of protecting maternal health."[88]

In addition, abortion is particularly unsuited to a multiplicity of inconsistent state and local laws. The conflicting regulations that would result from subjecting abortion to the raw political process would not promote any cognizable federalism concern, but would only lead to an interstate traffic of women seeking to terminate their pregnancies.[89] The simple fact is that coercive abortion laws are unenforceable against the state's more affluent citizens. Those women who can afford it will travel to other states, while any "marginal reduction in abortions will come from among the very poor who are unable to afford transportation to states where the practice is permitted."[90] In the end, there will not be separate policies on abortion for women living in different states as much as there will be separate policies for women of different social and economic status. Women who are unable to travel elsewhere will be returned to the darkness of the pre-*Roe* era: whiskey as an anesthetic; doctors who are sometimes marginal or unlicensed practitioners, sometimes alcoholic, sometimes sexually abusive; unsanitary conditions; incom-

---

434-35 (hospitalization requirement "may force women to travel to find available facilities, resulting in both financial expense and additional health risk . . . [and therefore] may significantly limit a woman's ability to obtain an abortion").

[88] *Thornburgh*, 476 U.S. at 759.

[89] Some states or localities might attempt to make it a crime for women to travel elsewhere to seek an abortion, but such laws would be virtually unenforceable in a nation of open interstate borders. *Cf. Irish Court Says Girl Can Leave to Obtain Abortion in Britain*, New York Times, February 27, 1992, at A1, col. 1.

[90] John Kaplan, *Abortion as a Vice Crime: A "What If" Story*, 51 Law & Contemp. Probs. No. 1, 151, 159 (1988).

petent treatment; infection, hemorrhage, disfigurement and even death.[91]

As members of Congress, we are concerned that a patchwork of conflicting abortion laws will both produce friction among states and increase the burdens on already overtaxed health care systems in states that continue to maintain access to safe and legal abortions.[92] At the same time, health care facilities in those states and localities that curtail access to abortion will face a substantial increase in the number of women experiencing serious medical complications as a result of self-induced or back-alley abortions.

Some Justices have suggested that withdrawal by this Court of the right of women to choose to have an abortion would not necessarily result in the enactment of draconian anti-abortion laws.[93] We now know, however, that some legislatures will indeed enact very severe restrictions.[94]

---

[91] As a consequence of *Roe*, abortion-related deaths dropped sharply. *See* Cates & Rochat, *Illegal Abortions in the United States: 1972-74*, 8 Fam. Plan. Persp. 86, 87, 91-92 (1976); *see also* Cates, *Legal Abortion: The Public Health Record*, 215 Science 1586 (1982).

[92] In the two years following New York's decision to permit licensed physicians to provide abortions to women less than 24 weeks pregnant, 60% of the approximately 440,000 abortions performed in New York City were performed on nonresidents. Berger *et al.*, *Maternal Mortality Associated with Legal Abortion in New York State: July 1, 1970—June 30, 1972*, 43 J. Obstet. & Gynec. 315 (1974). A return now to the pre-*Roe* regime, when metropolitan hospitals are already overwhelmed with AIDS cases, would be a disaster.

[93] *See Webster*, 492 U.S. at 521 (plurality opinion).

[94] Louisiana, Guam, and Utah have all recently passed the strictest possible criminal prohibitions on abortion. These laws track the criminal statute struck down in *Roe*, and in certain respects, are even more stringent. *Sojourner, T. v. Roemer*, 772 F. Supp. 930 (E.D. La. 1991); *Guam Society of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam. 1990); *Jane L. v. Bangerter*, No. 91-C-345-G (D. Utah complaint filed April 4, 1991).

While it is also true that some state legislatures would respond to a reversal of *Roe* by retaining access to safe and legal abortions, that freedom could be ephemeral: each future legislature could consider whether to reverse an earlier legislature's decision. Thus, in many—perhaps most—states, a woman's right to choose to have an abortion would be subject to the shifting winds of state and local legislative politics in never-ending struggles, session after session, year after year.

Even assuming that some state legislatures would consistently retain for their own residents the freedom to choose safe and legal abortions, there is nonetheless a compelling need for a national constitutional standard. During the "Jim Crow" era, only a minority of the states imposed *de jure* racial segregation in public schools and other public facilities. This Court nonetheless concluded that it was essential that freedom from state-imposed segregation be enjoyed by every American as a basic constitutional right.[95] The freedom to make one's own determinations about whether to become pregnant and whether to continue a pregnancy should similarly be a national right secured to every American woman, no matter what state she calls home.

---

[95] *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

CONCLUSION

For the foregoing reasons, we urge the Court to reaffirm the principles of *Roe v. Wade*, and reverse the judgment below in 91-744 and affirm the judgment below in 91-902.

Respectfully submitted,

WALTER DELLINGER *
Duke Law School
Corner of Science Drive
and Towerview Road
Durham, NC 27706
(919) 684-3404

LLOYD N. CUTLER
MICHAEL C. SMALL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Attorneys for the Amici Curiae

* Counsel of Record

March 6, 1992

APPENDIX

LIST OF *AMICI*

Amici are members of the Congress of the United States as follows:

Members of the United States House of Representatives

Neil Abercrombie (D-HI)
Gary L. Ackerman (D-NY)
Glenn M. Anderson (D-CA)
Michael A. Andrews (D-TX)
Robert E. Andrews (D-NJ)
Thomas H. Andrews (D-ME)
Chester G. Atkins (D-MA)
Les AuCoin (D-OR)
Jim Bacchus (D-FL)
Anthony C. Beilenson (D-CA)
Howard L. Berman (D-CA)
Sherwood L. Boehlert (R-NY)
Rick Boucher (D-VA)
Barbara Boxer (D-CA)
George E. Brown, Jr. (D-CA)
Albert G. Bustamante (D-TX)
Ben Nighthorse Campbell (D-CO)
Benjamin L. Cardin (D-MD)
Thomas R. Carper (D-DE)
William L. Clay (D-MO)
Cardiss Collins (D-IL)
John Conyers, Jr. (D-MI)
John W. Cox, Jr. (D-IL)
Peter A. DeFazio (D-OR)
Rosa DeLauro (D-CT)
Ronald V. Dellums (D-CA)
Butler Derrick (D-SC)
Norman D. Dicks (D-WA)
Julian C. Dixon (D-CA)
Calvin Dooley (D-CA)
Thomas J. Downey (D-NY)

Mervyn Dymally (D-CA)
Don Edwards (D-CA)
Eliot L. Engel (D-NY)
Lane Evans (D-IL)
Dante B. Fascell (D-FL)
Vic Fazio (D-CA)
Edward Feighan (D-OH)
Harold E. Ford (D-TN)
Barney Frank (D-MA)
Gary Franks (R-CT)
Martin Frost (D-TX)
Sam Gejdenson (D-CT)
Bill Green (R-NY)
Charles A. Hayes (D-IL)
Joan Kelly Horn (D-MO)
Nancy L. Johnson (R-CT)
Harry A. Johnston (D-FL)
Ben Jones (D-GA)
Walter B. Jones (D-NC)
Jim Jontz (D-IN)
Joseph P. Kennedy II (D-MA)
Barbara B. Kennelly (D-CT)
Michael J. Kopetski (D-OR)
Peter H. Kostmayer (D-PA)
Tom Lantos (D-CA)
Richard Lehman (D-CA)
William Lehman (D-FL)
Sander M. Levin (D-MI)
Mel Levine (D-CA)
John Lewis (D-GA)
Nita M. Lowey (D-NY)
Ronald K. Machtley (R-RI)
Edward J. Markey (D-MA)
Matthew G. Martinez (D-CA)
Robert T. Matsui (D-CA)
Jim McDermott (D-WA)
Kweisi Mfume (D-MD)
George Miller (D-CA)
Norman Y. Mineta (D-CA)
Patsy Mink (D-HI)

Jim Moody (D-WI)
James P. Moran (D-VA)
Constance A. Morella (R-MD)
Robert J. Mrazek (D-NY)
Stephen L. Neal (D-NC)
Eleanor Holmes Norton (D-DC)
James R. Olin (D-VA)
John W. Olver (D-MA)
Major Owens (D-NY)
Frank Pallone (D-NJ)
Leon E. Panetta (D-CA)
Ed Pastor (D-AZ)
Donald M. Payne (D-NJ)
Nancy Pelosi (D-CA)
Pete Peterson (D-FL)
David Price (D-NC)
Jack Reed (D-RI)
Bill Richardson (D-NM)
Edward R. Roybal (D-CA)
Martin Olav Sabo (D-MN)
Bernard Sanders (I-VT)
James H. Scheuer (D-NY)
Patricia Schroeder (D-CO)
Charles Schumer (D-NY)
Christopher Shays (R-CT)
David E. Skaggs (D-CO)
Louis M. Slaughter (D-NY)
Lawrence J. Smith (D-FL)
Olympia J. Snowe (R-ME)
Stephen J. Solarz (D-NY)
Fortney Pete Stark (D-CA)
Louis Stokes (D-OH)
Gerry E. Studds (D-MA)
Al Swift (D-WA)
Esteban Torres (D-CA)
Edolphus Towns (D-NY)
Jolene Unsoeld (D-WA)
Craig Washington (D-TX)
Maxine Waters (D-CA)

Henry A. Waxman (D-CA)
Ted Weiss (D-NY)
Alan Wheat (D-MO)
Pat Williams (D-MT)
Howard Wolpe (D-MI)
Ron Wyden (D-OR)
Sidney R. Yates (D-IL)
Dick Zimmer (R-NJ)

Members of the United States Senate

Brock Adams (D. WA)
Daniel Akaka (D. HI)
Max Baucus (D. MT)
Bill Bradley (D. NJ)
Quentin N. Burdick (D. ND)
John Chafee (R. RI)
William S. Cohen (R. ME)
Alan Cranston (D. CA)
Christopher J. Dodd (D. CT)
John Glenn (D. OH)
Tom Harkin (D. IA)
James M. Jeffords (R. VT)
Edward M. Kennedy (D. MA)
J. Robert Kerrey (D. NE)
John F. Kerry (D. MA)
Herb Kohl (D. WI)
Frank R. Lautenberg (D. NJ)
Patrick J. Leahy (D. VT)
Carl Levin (D. MI)
Howard Metzenbaum (D. OH)
Barbara Mikulski (D. MD)
Bob Packwood (R. OR)
Claiborne Pell (D. RI)
Donald W. Riegle (D. MI)
John D. Rockefeller, IV (D. WV)
John Seymour (R. CA)
Paul Simon (D. IL)
Paul Wellstone (D. MN)
Timothy E. Wirth (D. CO)